No. 15721

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RESERVE LIFE INSURANCE COMPANY, a Corporation, *Appellant*, vs. DONALD E. MARR, as Executor of the Estate of MARY I. MARR, Deceased, *Appellee.*	No. 15,721

Petition for Rehearing

On Appeal from the District Court of the United States for the Eastern District of Washington.

PAINE, LOWE, COFFIN AND HERMAN
Spokane, Washington
Attorneys for Appellant

C. W. HILL PRINTING CO

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AUTHORITIES CITED

CASES

TEXTS

The Appellant above named respectfully petitions this Honorable Court for rehearing of the Appeal in the above entitled cause or in the alternative for a hearing en banc, and in support of said Petition represents to the Court as follows:

Appellant reserves its argued position as to each of the points of the Appeal but in this Petition addresses itself to those features of the decision wherein Appellant believes the Court may be convinced its result is based upon an erroneous interpretation of the word "has", and upon the application of incorrect legal principles.

The court in its opinion in the first full paragraph of page 4 asks the following question: "If such be the object to be accomplished, (. . . to meet the standard of a hospital which the company determined would guarantee to the policy holders a high standard of care when hospitalized. . . . on the theory that the better the care the sooner the patient would be released and thereby minimize the expenses to the company) what difference would it make to a recovery whether the named facilities were under one management so long as the care was expertly provided and readily at hand?" The answer to this question is found in the testimony of Dr. Rowe on pages 145 and 146 of the Transcript of Record where he testified that had the patient been admitted to either The Deaconess or St. Luke's Hospital (hospitals admittedly providing the named facilities and staff required by the definition of the contracts, see pages 128 through 131 of the Transcript of Record) the patient would have been discharged in a matter of approximately a month. This very case is a vivid example that the

mere availability of the named facilities as distinguished from their ownership and operation will not accomplish the objective of a higher standard of care which in turn would see an earlier release of the patient and minimize the expenses of the company. Stated in another way, an institution which has these named facilities is not going to keep a person confined who no longer needs these facilities while an institution which merely has available these named facilities, may keep a patient many months after the need for the facilities has passed, as witness the case at hand. Thus the mere availability of these facilities does not guarantee the policy holder a high standard of care so that he will be released sooner and thereby minimize the company's expense, and the objective of the definition, as set forth by this Court, is made ineffectual by the facts of this case in that there is imposed upon the insurer a fourteen month liability, rather than a one month liability.

Apparently the controlling legal principle of the Court's decision appears in the first full paragraph on page 4 of the opinion wherein the Court states:

> "In so deciding we are not disregarding plain and explicit language but holding that a *liberal construction of the language of the policies supports* the finding of the trial court that the facilities furnished by the hospital in which the insured was confined were in substantial compliance with the definition of a 'hospital' contained in the policy." (Emphasis supplied)

In effect the Court held that the facilities furnished by the Jane O'Brien Hospital complied with the definition of a hospital as contained within the policy. This conclusion is substantiated by that portion of the opinion which observes

that the policies do not specifically require that either the laboratory or the surgery be on the premises or within the confines of a building or buildings owned and operated by the confining institution as an integrated whole.

The word or phrase liberally construed in favor of the object to be accomplished was "has". Manifestly the language ". . . an operating room where major surgical operations may be performed . . .", is neither ambiguous nor indefinite and the court's decision does not so hold. Rather the Court, in applying the rule of liberal construction, held that the language ". . . an institution which has . . .", should be construed to mean an institution which either makes available or furnishes certain facilities as set forth in the definition of a hospital contained in the policies.

The rule that contracts of insurance are to be liberally construed to accomplish the purpose for which they are made is a well established rule of construction. Yet it is a cardinal principle of insurance law that the insurance contract will not be liberally construed in favor of the insured and strictly against the company unless there is doubt, uncertainty or ambiguity as to its meaning and the contract is fairly susceptible of two interpretations, one in favor of the insured and the other favorable to the company.

> *Handely v. Oakley,* 10 Wn. (2d) 396, 116 P. (2d) 781; *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509;
>
> "Appellant seems to argue that the policy sued upon was intended to give protection against an absconding vendee, and that, under the familiar rule that the policy must be liberally construed in favor of the insured and strictly against the insurer, we should re-

verse the action of the trial court. The trouble with this argument is that the language of the policy is plain and unambiguous, and permits of no interpretation or construction other than to give the words used their usual and ordinary meaning."

Seattle Dodge Service Co. v. Royal Ins. Co., 238 P. 568 (1925), 135 Wash. 524.

"The purpose of the Insurance contract should be considered. If the contract is fairly susceptible of two different conclusions, the one which is most favorable to the assured will be adopted. *Jack v. Standard Marine Ins. Co.*, 33 Wn. (2d) 265, 205 P. (2d) 351, 8 ALR (2d) 1426. Where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning. (Case cited) But the rule that an insurance policy must be construed strictly against the company and liberally in favor of those afforded protection by it, has no application where the provisions of the policy are neither ambiguous nor difficult of comprehension. (Cases cited) And a court is not at liberty to revise a contract under the theory of construing it. (Case cited)."

Jeffries v. Gen. Cas. Co. of Am., 46 Wn. (2d) 543, 283 P. (2d) 128, (1955).

The decision of this Court does not specifically refer to any language contained within the definition of a hospital as being doubtful, uncertain or ambiguous. As indicated earlier, the only word or phrase contained in the definition of a hospital which appears to have been liberally construed by the Court was "has". If such be the case, the Court disregarded the plain and explicit meaning of the word "has" and in effect substituted therefor either the words "has available" or "furnishes".

The word "has" is the third person singular of the present indicative of have. 39 *Corpus Juris Secundum*, pp. 781-782. "Have" is the derivative root and the definition contained in the policy could be rephrased without affecting its meaning so as to have read as follows:

> "The word 'hospital' whenever used in this policy means institutions which have a laboratory, x-ray equipment and an operating room where major surgical operations may be performed . . ."

The word "have" is defined by *Funk & Wagnalls' New Standard Dictionary of the English Language*, 1922 Edition, as follows:

> "To hold as owner, possessor, occupier, or controller; be in possession or control of; own, possess; . . ."

The dictionary definition has been cited by the Louisiana Courts in *Creech v. Errington*, 207 La. 615, 21 So. (2d) 761, where the Court adopted the language set out in *Webster's New International Dictionary*:

> "Have. to hold in possession or control; to hold as property; to own; as he *has* a farm." (Emphasis supplied)

Likewise, in a recent North Carolina decision, *Sabine v. Gill*, 229 N.C. 599, 51 SE (2d) 1, the Court stated:

> "The word 'have' . . . is pertinently defined in the dictionaries as meaning 'to hold in possession or control; to hold as property; to own,' Webster; 'to hold or possess in ownership; to own,' Century. 'And it has been used immemorially to denote the ultimate in possession, control or ownership, to possess corporally;' Black's Law Dictionary."

The following cases construing the word "have" clearly indicate that it implies ownership or the state of possession. "Have" has been held to be synonymous with the word "keep". See *Stewart v. Commonwealth,* 270 S.W. 718; *State v. Harwi,* 230 Pac. 331; *Mangan v. Howard,* 238 Mass. 1, 130 N.E. 76. "Have" has been construed to mean to hold in possession or to control or to own. See *Smith v. State,* 277 S.W. 530; *Boykin v. State,* 129 So. 491; *U. S. v. Ninety-Nine Diamonds,* 139 F. 961, (CCA –8th); *Busteed v. Cambridge Savings Bank,* 306 Mass. 9, 26 N.E. (2d) 983. "Have" has been treated as being synonymous with ownership and, particularly when applied to property, it implies ownership. See *Chicago Home for Girls v. Carr,* 300 Ill. 478, 133 N.E. 344; *U. S. v. Ninety-Nine Diamonds, supra.*

That the definition of a hospital contained within the insurance agreements contemplated possession and ownership and the incidence thereof, control and supervision, is further demonstrated by the definition of the word "institution". Institution is defined by *Funk & Wagnall's New Standard Dictionary of the English Language,* 1922 *Edition, as follows*:

> "Institution. That which is instituted or established; . . . a corporate body or establishment instituted and organized for public use, . . ."

The synonym of "institution", "establishment" is defined as a body of persons composing a business organization or private institution, together with the premises they occupy. As is thus apparent, the use of the term "institution" implies an established organization including not only certain facilities and a staff but supervision over the same as an integrated whole.

The word "has" is neither ambiguous, uncertain or doubtful in its meaning and its construction has been the subject of judicial interpretation on numerous occasions. Likewise, the various dictionary definitions are clear and explicit. In the absence of a finding of ambiguity, the rule of liberal construction invoked by the court is inappropriate. The word "has" must be accorded its plain and ordinary meaning and since its meaning is plain and unambiguous, there is nothing to interpret or construe and the Court erred in invoking the rule of liberal construction.

That portion of the hospital definition relating to medical supervision was the subject of judicial interpretation in *McKinney v. American Security Life Ins. Co.*, 76 So. (2d) 630. It is a recognized principle of insurance contract construction that the rule of liberal construction has no application where the particular language has acquired by judicial interpretation a clear and definite meaning. *Davis v. Combined Insurance Co. of America*, 70 S.E. (2d) 814; 44 C.J.S. Sec. 297, p. 1192, Note 14.

Wherefore, Appellant respectfully submits that this Honorable Court erred in invoking the rule of liberal construction, in the absence of a finding, that the particular language contained in the hospital definition was either ambiguous or difficult of comprehension and Appellant petitions for a rehearing of the appeal in the above entitled cause or in the alternative for a hearing en banc.

Respectfully submitted,
PAINE, LOWE, COFFIN AND HERMAN
By G. J. SILVERNALE, Jr.
Attorneys for Appellant.

STATE OF WASHINGTON }
County of Spokane } ss.

G. J. SILVERNALE, JR., being first duly sworn, on oath certifies and says:

That he is one of the attorneys for appellants in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

G. J. SILVERNALE, Jr.

SUBSCRIBED AND SWORN to before me at Spokane, Washington, this 20th day of May, 1938.

EDWIN R. ROBERTS
Notary Public in and for the State
of Washington, residing at Spokane.